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13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA**

15 JOHN DOE #1 AND JOHN DOE #2,
16 Plaintiffs,
17 vs.
18 TWITTER, INC.,
19 Defendant.

20 Case No. 3:21-cv-00485-JCS

21 **PLAINTIFFS' OPPOSITION TO**
22 **DEFENDANT'S MOTION TO DISMISS THE**
23 **FIRST AMENDED COMPLAINT**

24 Hearing Scheduled: July 30, 2021

TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT	1
I. THE MOTION TO DISMISS STANDARD	1
II. THE FIRST AMENDED COMPLAINT (“FAC”) STATES A CLAIM FOR BOTH DIRECT AND BENEFICIARY SEX TRAFFICKING VIOLATIONS, CONSISTENT WITH SECTION 230’S EXCEPTION FOR SEX TRAFFICKING LAWSUITS UNDER FOSTA.....	3
A. The FAC States a Claim for Sex Trafficking Pursuant to Direct Perpetrator Liability Under Section 1591(a)(1) and 1595.....	3
1. The FAC Sufficiently Alleges that Twitter Knowingly Provided, Obtained, and Maintained Persons on its Platform by any Means.....	3
2. The FAC Sufficiently Alleges that Twitter Knew, or Recklessly Disregarded that, the Commercial Sex Acts at Issue Featured Minors.....	5
B. The FAC States a Claim for Sex Trafficking Pursuant to Beneficiary Liability Under Sections 1591(a)(2) and 1595.....	6
1. The FAC Sufficiently Alleges that Twitter Knowingly Benefited Financially and by Receiving Something of Value from the Commercial Sex Acts at Issue.	6
2. The FAC Sufficiently Alleges that Twitter Participated in What it Knew or Should Have Known was a Sex Trafficking Venture.....	10
C. The Legislative History Demonstrates Congress’s Intent to Protect Victims of Sex Trafficking Such as the John Doe Plaintiffs in this Case.....	16
III. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT DOES NOT BAR CLAIMS FOR TWITTER’S KNOWING, UNLAWFUL CONDUCT.....	19
A. The Plain Text of CDA 230 Does Not Immunize Twitter’s Knowing Violations of Child Pornography Laws.	19
B. The Stated Purpose of CDA 230 is Inconsistent and Incompatible with the Absolute-Immunity Interpretation Urged by Twitter.	21
C. CDA 230 Does Not Immunize Twitter from Civil Liability for Possession and Distribution of Child Pornography because it is Illegal Contraband, Not Speech.	22
D. Twitter Failed its Statutory Duty to Report the Child Sex Abuse Material Harming the Plaintiffs.....	25

1	IV. THE FAC SUFFICIENTLY ALLEGES A PRODUCT LIABILITY	
2	CLAIM BASED ON TWITTER'S UNREASONABLY UNSAFE DESIGN AND	
3	PERFORMANCE.....	26
4	V. PLAINTIFFS' STATE LAW CLAIMS SHOULD BE ALLOWED TO	
5	PROCEED BECAUSE THEY SUFFICIENTLY ALLEGE A VIOLATION OF	
6	TWITTER'S STATUTORY OBLIGATIONS AND DUTY OF CARE ONCE IT	
7	KNEW ABOUT THE CSAM DEPICTING THE PLAINTIFFS.	27
8	VI. PLAINTIFFS' BUSINESS AND PROFESSIONAL CODE SECTION	
9	17200 SUFFICIENTLY ALLEGES A CLAIM.	29
10	CONCLUSION	30
11	CERTIFICATE OF SERVICE	32
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Cases

4	<i>A.B. v. Hilton Worldwide Holdings Inc.</i> , 484 F.Supp.3d 921 (D. Or. Sept. 8, 2020)	7
5	<i>A.B. v. Marriott Int'l Inc.</i> , 455 F. Supp. 3d 171 (E.D. Pa. 2020).....	7
6	<i>A.C. v. Red Roof Inns, Inc.</i> , 2020 WL 3256261 (S.D. Ohio Jun. 16, 2020)	7
7	<i>Ardolf v. Weber</i> , 332 F.R.D. 467 (S.D.N.Y. 2019).....	4
8		
9	<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	2
10	<i>B.M. v. Wyndham</i> , 2020 WL 4368214 (N.D. Cal. July 30, 2020)	passim
11	<i>Balderas v. Countrywide Bank, N.A.</i> , 664 F.3d 787 (9th Cir. 2011)	29, 30
12	<i>Barnes v. Yahoo!, Inc.</i> , 570 F.3d 1096 (9th Cir. 2009).....	20
13		
14	<i>Beaver v. Tarsadia Hotels</i> , 29 F. Supp. 3d 1294 (S.D. Cal. 2014), <i>aff'd</i> 816 F.3d 1170 (9th Cir. 2016)	26
15		
16	<i>Boyle v. United States</i> , 556 U.S. 938 (2009)	11
17	<i>Cheneau v. Garland</i> , No. 15-70636, 2021 WL 1916947 (9th Cir. May 13, 2021)	19
18		
19	<i>Chetal v. Am. Home Mortg.</i> , No. C 09-02727 CRB, 2009 WL 2612312 (N.D. Cal. Aug. 24, 2009)	30
20		
21	<i>Dillard v. Victoria M. Morton Enterprises, Inc.</i> , No. 08-1339 FCD/GGH, 2008 WL 11388472 (E.D. Cal. Oct. 8, 2008)	29, 30
22		
23	<i>DiRosa v. Showa Denko K.K.</i> , 44 Cal. App. 4th 799 (1996)	26
24		
25	<i>Doe 1 v. Red Roof Inns, Inc.</i> , Case No. 1:19-cv-3840, 2020 WL 1872335 (N.D. Ga. Apr. 13, 2020)	14
26		
27	<i>Doe S.W. v. Lorain-Elyria Motel, Inc.</i> , No. 2:19-CV-1194, 2020 WL 1244192 (S.D. Ohio Mar. 16, 2020)	7, 14
28		

1	<i>Doe v. Bates</i> , 2006 WL 3813758 (E.D. Tex., Dec. 27, 2006)	24
2	<i>Dyer v. United States</i> , 832 F.2d 1062 (9th Cir. 1987)	19
3	<i>E.S. v. Best W. Int'l, Inc.</i> , No. 3:20-CV-00050-M, 2021 WL 37457 (N.D. Tex. Jan. 4, 2021)...	14
4	<i>Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC</i> , 521 F.3d 1157 (9th Cir.	
5	2008)	19, 21
6	<i>Finelite, Inc. v. Ledalite Architectural Prods.</i> , No. C-10-1276 MMC, 2010 WL 3385027, at *2	
7	(N.D. Cal. Aug. 26, 2010).....	31
8	<i>Fraley v. Facebook, Inc.</i> , 830 F. Supp. 2d 785, 811 (N.D. Cal. 2011).....	31
9	<i>Geiss v. Weinstein Co. Holdings LLC</i> , 383 F.Supp. 3d 156 (S.D.N.Y. 2019).....	8
10	<i>Gray v. Toyota Motor Sales, U.S.A., Inc.</i> , 554 F. App'x 608 (9th Cir. 2014)	2
11	<i>H.H. v. G6 Hosp., LLC</i> , 2019 WL 6682152 (S.D. Ohio Dec. 6, 2019)	7
12	<i>In re Tobacco II Cases</i> , 46 Cal. 4th 298 (2009).....	31
13	<i>In re Tracht Gut, LLC</i> , 836 F.3d 1146 (9th Cir. 2016).....	2
14	<i>J.C. v. Choice Hotels Int'l, Inc.</i> , No. 20-CV-00155-WHO, 2020 WL 6318707 (N.D. Cal. Oct. 28,	
15	2020)	7, 14
16	<i>Jabagat v. Lombardi</i> , 2015 WL 11004900 (S.D. Miss. Jan. 30, 2015).....	8
17	<i>Jimenez v. Quarterman</i> , 555 U.S. 113 (2009)	19
18	<i>Kolbek v. Twenty First Century Holiness Tabernacle Church, Inc.</i> , 2013 WL 6816174 (W.D.	
19	Ark. Dec. 24, 2013).....	8
20	<i>Lemmon v. Snap, Inc.</i> , No. 20-55295, 2021 WL 1743576 (9th Cir. May 4, 2021)	27
21	<i>M.A. v. Wyndham Hotels & Resorts, Inc.</i> , 425 F. Supp. 3d 959, 965 (S.D. Ohio 2019)	7, 14, 15
22	<i>Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC</i> , 141 S. Ct. 13 (2020) (Thomas, J.	
23	dissenting)	25

1	<i>Noah v. AOL Time Warner, Inc.</i> , 261 F. Supp. 2d 532 (E.D. Va. 2003)	24
2	<i>Noble v. Weinstein</i> , 335 F. Supp. 3d 504 (S.D.N.Y. 2018)	14
3	<i>Paroline v. U.S.</i> , 572 U.S. 434 (2014)	23
4	<i>Perry v. Robertson</i> , 201 Cal.App.3d 333 (1988)	29
5	<i>Plascencia v. Lending 1st Mortg.</i> , 583 F. Supp. 2d 1090 (N.D. Cal. 2008)	30
6	<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	21
7	<i>Ricchio v. McLean</i> , 853 F.3d 553 (1st Cir. 2017)	15
8	<i>Rowe v. Educ. Credit Mgmt. Corp.</i> , 559 F.3d 1028 (9th Cir. 2009)	19
9	<i>S. Y. v. Naples Hotel Co.</i> , 476 F. Supp. 3d 1251 (M.D. Fla. Aug. 5, 2020)	7
10	<i>S.J. v. Choice Hotels Int'l, Inc.</i> , 473 F. Supp. 3d 147 (E.D.N.Y. 2020)	14
11	<i>S.Y. v. Wyndham Hotels & Resorts, Inc. & Laxmi of Naples, LLC</i> , No. 2:20-CV-619-JES-MRM, 2021 WL 1814651 (M.D. Fla. May 6, 2021)	14
12	<i>Smith v. United States</i> , 508 U.S. 223 (1993)	4
13	<i>Tinoco v. San Diego Gas & Elec. Co.</i> , No. 17-CV-2433-BAS-JLB, 2018 WL 4562479 (S.D. Cal. Sept. 21, 2018)	29, 30
14	<i>United States v. Afyare</i> , 632 F. App'x 272 (6th Cir. 2016)	11, 14
15	<i>United States v. Cook</i> , No. 10-00244-02-CR-W-DW, 2013 WL 3039296, at (W.D. Mo. June 17, 2013), <i>aff'd</i> , 782 F.3d 983 (8th Cir. 2015)	4
16	<i>United States v. Flanders</i> , 752 F.3d 1317 (11th Cir. 2014)	4
17	<i>United States v. Jungers</i> , 702 F.3d 1066 (8th Cir. 2013)	4
18	<i>United States v. Love</i> , 743 F. App'x 138 (9th Cir. 2018)	4
19	<i>United States v. Todd</i> , 627 F.3d 329 (9th Cir. 2010)	13
20	<i>United States v. Tollefson</i> , 367 F. Supp. 3d 865 (E.D. Wis. 2019)	4, 5

1	<i>United States v. Turkette</i> , 452 U.S. 576 (1981).....	11
2	<i>Washington v. Deleon</i> , 2019 WL 11691424 (N.D. Cal. July 9, 2019)	11
3		
4	<i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997).....	24

5 **Statutes**

6	18 U.S.C. § 1591.....	passim
7		
8	18 U.S.C. § 1595.....	passim
9		
10	18 U.S.C. § 2252.....	12, 23, 24, 25
11		
12	18 U.S.C. § 2252A.....	passim
13		
14	18 U.S.C. § 2256.....	26
15		
16	18 U.S.C. § 2258A.....	26
17		
18	18 U.S.C. § 2258B.....	26
19		
20	47 U.S.C. § 230.....	passim
21		
22	Cal. Evid. Code § 669	29

17 **Other Authorities**

18	115 Cong. Rec. H1290, 1291 (statement of Rep. Jackson Lee)	18
19		
20	164 Cong. Rec. S1849-08, S1853 (statement of Sen. Heitkamp).....	17
21		
22	164 Cong. Rec. S1849-08, S1855 (statement of Sen. Portman).....	18
23		
24	164 Cong. Rec. S1860-62) (statement of Senator Durbin).....	17
25		
26	4 Witkin Cal. Proc. (5th ed. 2008) § 402ff	29
27		
28	47 U.S.C.A. § 230.....	22
	Allow States and Victims to Fight Online Sex Trafficking Act of 2017, PL 115-164, 132 Stat	
	1253 (2018).....	17

1	Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, PL No. 115-299	
2	(2018).....	23
3	Protection of Children from Sex Predators Act of 1998, PL 105-314, 112 Stat 2974 (1998)	25
4		

5 **Rules**

6	Fed.R.Civ.P. 12(b)(6).....	1
7		
8		
9		
10		
11		
12		
13		
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INTRODUCTION

This is an actual knowledge case. Twitter knew that child pornography—also known as child sex abuse material (“CSAM”)¹—presenting two (2) thirteen-year-old boys engaged in sex acts was being widely distributed on its platform. Twitter also knew that this CSAM was created through an act of sex trafficking. With this knowledge, Twitter took the deliberate action of leaving the material on its platform, allowing it to gather hundreds of thousands of views, numerous shares (re-tweets), and countless downloads and screen captures. Each viewing and re-tweet further victimized Plaintiffs. Each viewing and re-tweet accelerated interactions on the Twitter platform, which in turn, immeasurably increased profit for Twitter, as evidenced through Twitter’s own platform-monetization structure.

In its Motion to Dismiss the First Amended Complaint (“MTD”), Twitter claims that the entire action should be dismissed under 47 U.S.C. § 230 (“CDA 230”) and that Plaintiffs have failed to state a claim upon which relief can be granted. This is incorrect for four (4) definitive reasons. First, Plaintiffs’ claims under the Trafficking Victims Protection Act (“TVPA”) are exempt from CDA 230. Second, CDA 230’s plain language provides no protection for CSAM possession and distribution. In CDA 230, Congress provided platforms like Twitter a safe harbor for good-faith removal—not bad-faith redistribution—of harmful material like obscenity and CSAM. Third, Plaintiffs’ product liability claim does not seek to treat Twitter as a “publisher” or “speaker” and so falls outside CDA 230’s scope. Fourth, and finally, Plaintiffs’ state-law claims sufficiently allege wrongdoing and a breach of its duty of care through Twitter’s knowing distribution of CSAM depicting Plaintiffs.

ARGUMENT

I. THE MOTION TO DISMISS STANDARD

To survive a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6),

¹ The codified legal term is “child pornography.” See 18 U.S.C. § 2256(8). This brief will use the term “child sexual abuse material” or “CSAM”—because it more accurately describes the harmful and abusive nature of the material.

1 a complaint must allege “sufficient factual matter, accepted as true, to state a claim for relief
 2 that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual
 3 content that allows the court to draw the reasonable inference that the defendant is liable for the
 4 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted).

5 A court must construe the complaint’s allegations “in the light most favorable to the
 6 nonmoving party.” *Gray v. Toyota Motor Sales, U.S.A., Inc.*, 554 F. App’x 608, 608–09 (9th
 7 Cir. 2014) (internal citations omitted). A court also “must accept as true all facts alleged in the
 8 complaint and draw all reasonable inferences in favor of the plaintiff.” *In re Tracht Gut, LLC*,
 9 836 F.3d 1146, 1150 (9th Cir. 2016) (internal citations omitted).

10 Yet in its MTD, Defendant improperly introduces factual claims to support its
 11 arguments, and essentially demands that the Court draw all reasonable inferences in its favor.
 12 This is contrary to well-established law and basic principles of common sense. Specifically,
 13 Twitter’s MTD improperly contains an extended discussion of facts outside the FAC, including
 14 Twitter’s alleged zero-tolerance for CSAM, its child protection measures, and how many
 15 accounts it has ostensibly suspended for CSAM violations. MTD at 1-6. Defendant also
 16 improperly discusses its policies and practices at length elsewhere in the MTD, including
 17 arguing why Facebook makes millions more NCMEC reports than Twitter does, and claiming
 18 that “Twitter takes active steps against sex trafficking[.]” MTD at 6, 19. Moreover, Twitter
 19 even inappropriately attaches declarations to its MTD, as an apparent attempt to offer its own
 20 evidence outside the four corners of the FAC. MTD; Exhibits 1 to 8. Additionally, Twitter also
 21 improperly denies the truth of Plaintiffs’ allegations rather than contesting their legal
 22 sufficiency. MTD at 14. Finally, Twitter’s language erroneously suggests that Plaintiffs must
 23 prove their case at this initial stage of litigation.² However, as basic rules of pleading dictate,
 24

25
 26 ² See, e.g., Def. Mot. to Dismiss at 17 (claiming Plaintiffs’ allegations do not “establish[] a
 27 causal relationship” between Plaintiffs’ sex trafficking and Twitter’s benefiting); *id.* (“Thus,
 Plaintiffs must *show* that Twitter knew specifically[.]” (emphasis added); *id.* (claiming that
 §1591’s mens rea is “difficult to prove” to contest Plaintiffs’ allegations about Twitter’s

1 Plaintiffs are only required to allege sufficient facts to state a legal claim and are entitled to two
 2 presumptions (one of which Defendant does not even acknowledge): (1) that their facts are to
 3 be considered as true, and (2) that all reasonable inferences shall be drawn in their favor.

4 **II. THE FIRST AMENDED COMPLAINT (“FAC”) STATES A CLAIM FOR
 5 BOTH DIRECT AND BENEFICIARY SEX TRAFFICKING VIOLATIONS,
 6 CONSISTENT WITH SECTION 230’S EXCEPTION FOR SEX
 7 TRAFFICKING LAWSUITS UNDER FOSTA.**

8 Plaintiffs’ FAC properly alleges claims under Section 230’s exception for sex
 9 trafficking lawsuits, and specifically, Plaintiffs have stated claims for (a) direct sex trafficking
 10 violations under 18 U.S.C. §§ 1591(a)(1), and (b) beneficiary sex trafficking violations under
 11 the standards for both §1591(a)(2) and § 1595(a).

12 **A. The FAC States a Claim for Sex Trafficking Pursuant to Direct
 13 Perpetrator Liability Under Section 1591(a)(1) and 1595.**

14 **1. The FAC Sufficiently Alleges that Twitter Knowingly Provided, Obtained,
 15 and Maintained Persons on its Platform by any Means.**

16 Section 1591(a)(1) provides for liability for a perpetrator who “knowingly . . . recruits,
 17 entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by
 18 any means a person,” while “knowing, or . . . in reckless disregard of the fact . . . that the person
 19 has not attained the age of 18 years and will be caused to engage in a commercial sex act[.]” 18
 20 U.S.C. § 1591(a). Section 1591 does not require the offending party to be involved in a venture.

21 The phrase “by any means” is not defined and contains no exception for electronic or
 22 virtual actions. 18 U.S.C. § 1591 (a)(1). The terms “provided,” “obtained,” and “maintained”
 23 are not defined in context to § 1591. Courts must interpret terms not defined in a statute
 24 according to their ordinary meaning. “When a word is not defined by statute, we normally
 25 construe it in accord with its ordinary or natural meaning.” *Smith v. United States*, 508 U.S.

26 knowledge); *id.* at 29 (“To the extent Plaintiffs rely on allegations that Twitter was generally
 27 aware that sex trafficking occurred on its platform, they also fail to establish Twitter’s
 28 constructive knowledge that the videos involved sex trafficking.”) (emphasis added); *id.* at 29
 (“Last, the mere passage of nine days between the offending Tweet and the content takedown
 is not enough to show that Twitter ‘should have known.’”) (emphasis added).

1 223, 228 (1993) (internal citation omitted). The Ninth Circuit has done this by citing standard
 2 dictionary definitions to interpret undefined terms in the TVPRA. *United States v. Love*, 743 F.
 3 App'x 138, 139 (9th Cir. 2018) (using Webster's dictionary to define "force" in § 1591(a)(1)
 4 charge against sex trafficker).³ In the instant case, the terms "provided," "obtained," and
 5 "maintained" have the following common meanings:

6 **Provide:** "to supply or make available (something wanted or needed)" or "to
 7 make something available to;"⁴

8 **Obtain:** "to gain or attain usually by planned action or effort;"⁵

9 **Maintain:** "to keep in an existing state (as of repair, efficiency, or validity),
 10 preserve from failure or decline or to continue or persevere in."⁶

11 Here, Plaintiffs have alleged that Twitter made them available, as depicted in a CSAM
 12 compilation video, to users on Twitter, having gained or attained Plaintiffs by the same
 13 electronic means, and having kept them in the same existing state, all despite Plaintiffs' own
 14 reports and objections.⁷

15 Pornography, including child pornography, can be the basis for a § 1591(a)(1) claim.
 16 See, e.g., *United States v. Flanders*, 752 F.3d 1317, 1330 (11th Cir. 2014) (applying §
 17 1591(a)(1) for fraudulently inducing adults to participate in pornography film); *United States v.*
 18 *Tollefson*, 367 F. Supp. 3d 865, 878-880 (E.D. Wis. 2019) (§ 1591(a) claim where defendant
 19 induced 13 year old to create pornography of herself over an app). Notably, in *Tollefson*, the
 20 defendant manipulated a child into creating pornography of herself to share with him over an

22
 23 ³ See also *United States v. Jungers*, 702 F.3d 1066, 1070-71 (8th Cir. 2013) (using various
 24 dictionaries to define "obtain" to include sex buyer in § 1591(a)(1) charge); *United States v.*
 25 *Cook*, No. 10-00244-02-CR-W-DW, 2013 WL 3039296, at *11-12 (W.D. Mo. June 17,
 26 2013), *aff'd*, 782 F.3d 983 (8th Cir. 2015) (using Webster's dictionary to define "obtain" in §
 1591(a)(1) charge against sex buyer and pornography user); *Ardolf v. Weber*, 332 F.R.D. 467,
 474 (S.D.N.Y. 2019) (using Merriam-Webster's Dictionary to define "entice" and recruit" to
 deny motion to dismiss § 1591(a)(1) charge based on sexual molestation of models during
 photo shoot).

27 ⁴ *Provide*, <https://www.merriam-webster.com/dictionary/provide> (last viewed June 4, 2021).

28 ⁵ *Obtain*, <https://www.merriam-webster.com/dictionary/obtain> (last viewed June 4, 2021).

⁶ *Maintain*, <https://www.merriam-webster.com/dictionary/maintain> (last viewed June 4, 2021).

⁷ See FAC at ¶¶ 101-131, 147-155.

1 app, in exchange for certain virtual rewards or currencies. 367 F. Supp. 3d at 868-870. The
 2 court found these allegations stated a claim for sex trafficking, as the virtual rewards meant that
 3 the video was a commercial sex act, and the victim was a minor. *Id.* at 879-880. The *Tollefson*
 4 decision demonstrates that child pornography allegations, where the defendant did not have
 5 physical contact or exchange money with the victim, can state a § 1591(a)(1) sex-trafficking
 6 claim. The FAC, by alleging that Twitter knowingly possessed, disseminated, and refused to
 7 remove sex trafficking content, sufficiently alleges that Twitter knowingly provided, obtained,
 8 and maintained sex trafficked persons by electronic means through Twitter's platform.⁸

9 **2. The FAC Sufficiently Alleges that Twitter Knew, or Recklessly Disregarded
 10 that, the Commercial Sex Acts at Issue Featured Minors.**

11 Section 1591(a)(1) applies to anyone who engages in the above actions while “knowing,
 12 or . . . in reckless disregard of the fact . . . that the person has not attained the age of 18 years
 13 and will be caused to engage in a commercial sex act[.]”. 18 U.S.C. § 1591(a). A commercial
 14 sex act means “any sex act, on account of which anything of value is given to or received by
 15 any person[.]” § 1591(e)(3).

16 Plaintiffs have alleged actual knowledge. Plaintiffs alleged that they reported child
 17 sexual abuse material featuring them to Twitter, depicting them engaged in sexual acts due to
 18 extortion and blackmail (that is, in exchange for “something of value”).⁹ Plaintiffs also allege
 19 that John Doe 1 provided proof of his age to Twitter, that numerous users commented on their
 20 belief that videos featured minors and that one disseminating account had already been reported
 21 to Twitter for CSAM.¹⁰

22 Taken together, these allegations are more than sufficient to indicate that Twitter knew,
 23 or at least was in reckless disregard of, Plaintiffs' status as minors when engaging in the
 24

25
 26
 27 ⁸ See FAC at ¶¶112-129.
 28 ⁹ *Id.* at ¶¶ 112, 114, 123.
¹⁰ *Id.* at ¶¶ 101-102, 114, 121-122.

1 commercial sex acts at issue. Thus, Plaintiffs sufficiently allege Twitter knowingly provided,
 2 obtained, and maintained them, by electronic means, knowing and in reckless disregard that
 3 they were minors who had been caused to engage in commercial sex acts, namely, creating
 4 CSAM of themselves through coercion and extortion.¹¹

5 **B. The FAC States a Claim for Sex Trafficking Pursuant to
 6 Beneficiary Liability Under Sections 1591(a)(2) and 1595.**

7 Section 1591(a)(2) provides for beneficiary liability for a perpetrator who
 8 “knowingly . . . benefits financially or by receiving anything of value, from participation in a
 9 venture which has engaged in an act described in violation of paragraph (1) . . . knowing, or . . .
 10 in reckless disregard of the fact . . . that the person has not attained the age of 18 years and will
 11 be caused to engage in a commercial sex act[.]” 18 U.S.C. § 1591(a). “Participation in a venture”
 12 means “knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).” §
 13 1591(e)(4). Section 1595(a) allows sex trafficking victims to sue both direct and beneficiary
 14 perpetrators, and those who benefit financially more generally: that is, by knowingly benefiting
 15 from what they know or should know is a sex trafficking venture. 18 U.S.C. §1595(a). The
 16 following will analyze the elements of both Sections, which have similar provisions for those
 17 who benefit financially, and distinct requirements for participation in a venture and the requisite
 18 level of knowledge.

19 **1. The FAC Sufficiently Alleges that Twitter Knowingly Benefited Financially
 20 and by Receiving Something of Value from the Commercial Sex Acts at
 21 Issue.**

22 “To state a claim under a section 1595(a) beneficiary theory,” Plaintiffs first “must
 23 allege facts from which the Court can reasonably infer that” Twitter “knowingly benefit[ted]
 24 financially or by receiving anything of value[.]” *B.M. v. Wyndham*, 2020 WL 4368214, at *4
 25 (N.D. Cal. July 30, 2020). Both §§1591(a)(2) and §1595 contain the same language as to the
 26
 27

28 ¹¹ FAC at ¶¶ 112-129.

1 financial benefit element of the standard.¹²

2 In *B.M.*, Defendant Wyndham Hotels argued that the financial benefit “must derive
 3 directly from, and be knowingly received in exchange for, participation in a sex trafficking
 4 venture.” *B.M.*, 2020 WL 4368214, at *4 (internal citations omitted). This district disagreed,
 5 finding that § 1595 claims could not be subjected to the same knowledge standard as § 1591
 6 without undermining the “should have known” language, and the Court concluded that it was
 7 sufficient to allege that the hotels knowingly received revenue from room rentals. *B.M. v.*
 8 *Wyndham*, 2020 WL 4368214, at *4 (internal citations omitted) (finding that hotel’s revenues
 9 from room rental to sex trafficker meets financial benefit element).¹³ Applying the *B.M.*
 10 standard for knowledge of the financial benefit to Plaintiffs’ § 1595 claim, Defendant Twitter
 11 knowingly received a benefit and something of value from the CSAM by monetizing it, as
 12 Plaintiffs allege.¹⁴ Furthermore, the value received does not have to be money. Plaintiffs allege
 13 that Twitter received something of value through the advertising on the page, through the data
 14 acquisition, since the CSAM video could only be seen by individuals with a Twitter account,
 15 and through the increase in activity on its platform via re-tweets and additional views of the
 16 CSAM. In the Twitter world, there is a currency to be had in viewers – the more viewers, the
 17 more popular the platform, which will lead to more advertisements, and new users from which
 18 data can be licensed.¹⁵

20

21 ¹² Compare § 1591(a) (“Whoever knowingly . . . benefits, financially or by receiving anything
 22 of value[.]”) with § 1595(a) (“[W]hoever knowingly benefits, financially or by receiving
 23 anything of value[.]”).

24 ¹³ Numerous other courts have taken this approach. *J.C. v. Choice Hotels Int’l, Inc.*, No. 20-
 25 CV-00155-WHO, 2020 WL 6318707, at *4 (N.D. Cal. Oct. 28, 2020); *A.B. v. Marriott Int’l*
 26 *Inc.*, 455 F. Supp. 3d 171, 191 (E.D. Pa. 2020); *H.H. v. G6 Hosp., LLC*, 2019 WL 6682152, at
 27 *2 (S.D. Ohio Dec. 6, 2019); *Doe S.W. v. Lorain-Elyria Motel, Inc.*, No. 2:19-CV-1194, 2020
 WL 1244192, at *5 (S.D. Ohio Mar. 16, 2020); *A.C. v. Red Roof Inns, Inc.*, 2020 WL 3256261,
 at *4 (S.D. Ohio Jun. 16, 2020); *S. Y. v. Naples Hotel Co.*, 476 F.Supp.3d 1251, 1255-56 (M.D.
 Fla. Aug. 5, 2020); *A.B. v. Hilton Worldwide Holdings Inc.*, 484 F.Supp.3d 921, 935-936 (D.
 Or. Sept. 8, 2020); *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 965 (S.D.
 Ohio 2019).

28 ¹⁴ FAC at ¶¶ 52-54; 74-79; 196, 200.

¹⁵ FAC at ¶¶ 25, 30-41, 52-54, 70-79,

1 Twitter cites two cases from other jurisdictions for the proposition that any benefit
 2 Twitter receives must have a causal relationship to the sex trafficking. MTD at 13, 15 (citing
 3 *Geiss v. Weinstein Co. Holdings LLC*, 383 F.Supp. 3d 156, 169 (S.D.N.Y. 2019); *Kolbek v.*
 4 *Twenty First Century Holiness Tabernacle Church, Inc.*, 2013 WL 6816174, at *16 (W.D. Ark.
 5 Dec. 24, 2013)). *Kolbek* is inapposite; it was a summary judgment decision analyzing whether
 6 commercial sex acts had occurred at all, testing the plaintiffs' evidence, not their complaint's
 7 sufficiency.¹⁶ *Geiss* is also distinguishable, because, in the instant case, Plaintiffs allege that
 8 Twitter profited specifically from the CSAM dissemination,¹⁷ while in *Geiss*, it was not clear
 9 whether the defendant's employees specifically benefited from his abuse, as opposed to merely
 10 being on his payroll. *Geiss v. Weinstein Co. Holdings LLC*, 383 F.Supp. 3d 156, 168-70
 11 (S.D.N.Y. 2019).¹⁸

12 Even if "knowingly receiving a benefit" means knowing that the benefit has a causal
 13 relationship to sex trafficking, Plaintiffs'§ 1591(a)(2) claim meets that standard, as Plaintiffs
 14 allege Defendant actually knew that it was directly benefitting from sex trafficking, because it
 15 continued to distribute the CSAM that it had monetized after it was notified of Plaintiffs' ages
 16 and extortion.¹⁹

17 In the MTD, Defendant flatly denies what Plaintiffs have plainly pled concerning the
 18 benefit Twitter received:

Defendant's Claims	Plaintiffs' Allegations
"There is no factual allegation that Twitter monetized or	"The distribution of the CSAM depicting John Doe was monetized by Twitter and it receive financial benefit from

22

23 ¹⁶ See *Kolbek*, 2013 WL 6816174 at *16 ("In sum, Plaintiffs offer no evidence of a causal
 24 relationship between the sex acts and the payment of expenses. The fact that sexual abuse was
 25 committed by the ministry's leader and that members of the ministry had their expenses paid
 26 for through ministry funds is simply not sufficient to establish a violation of 18 U.S.C. §
 1591.").

¹⁷ FAC at ¶¶ 196, 200.

¹⁸ *Jabagat* is also distinguishable; the plaintiffs in that case had no substantive factual
 27 allegations apart from reciting the TVPRA elements. See *Jabagat v. Lombardi*, 2015 WL
 28 11004900 (S.D. Miss. Jan. 30, 2015).

¹⁹ See, e.g., FAC at ¶¶ 30-41; 112-129; 200.

Defendant's Claims	Plaintiffs' Allegations
benefited from the videos.” MTD at 16.	its distribution on its platform.” FAC at ¶ 196.
“In fact, the FAC makes no effort to connect any of the allegations regarding Twitter’s revenue streams to the videos. Instead, the FAC assumes that Twitter must have monetized the videos and thereby received benefits from Plaintiffs’ alleged sex trafficking venture because Twitter monetizes all the content on its platform.” <i>Id.</i> at 16.	<p>“As described above, Twitter monetizes its platform through advertisements, sale of access to its API, and data collection.” <i>Id.</i> at ¶ 52.</p> <p>“As long as content on Twitter’s platform remains live, Twitter monetizes that content regardless of whether it is contrary to Twitter’s own policies or promotes illegal conduct.” <i>Id.</i> at ¶ 53.</p> <p>“Twitter thus profits from content on its platform that depicts rape, sex trafficking, child sexual abuse, and other illegal activity.” <i>Id.</i> at ¶ 54.</p>
“The FAC also fails to plausibly plead that Twitter knowingly generated revenue <i>“because of”</i> its alleged failure to remove the videos.” <i>Id.</i> at 16.	<p>“The videos remained live approximately another seven days, resulting in substantially more views and retweets.” <i>Id.</i> at ¶ 37.</p> <p>“The distribution of the CSAM depicting John Doe was monetized by Twitter and it received financial benefit from its distribution on its platform.” <i>Id.</i> at ¶ 196.</p>
“The FAC here merely references Twitter’s advertising and data licensing revenues; it does not allege a single fact to establish any causal link between either of those revenue streams and Twitter’s handling of the videos, much less that Twitter was aware of that link.” <i>Id.</i> at 17.	<p>“CSAM and sex trafficking are highly sought-after content on Twitter. This means that those wishing to view, buy, sell or trade images or videos of the sexual exploitation of others, to include children, have a platform that allows them to conduct this illegal activity. Furthermore, Twitter makes significant revenue from the presence, searches, connections, and interactions of such illegal and dangerous material.” <i>Id.</i> at ¶ 71.</p> <p>“Thus, while Twitter claims that it has a “zero-tolerance policy” for CSAM, its platform not only allows the distribution of CSAM, but its platform architecture also aids in the distribution of CSAM, and Twitter profits from it through advertisements.” <i>Id.</i> at ¶ 84.</p>
“Likewise, there is no allegation establishing a causal link between the videos and any of Twitter’s data licensing revenue.” <i>Id.</i> at 17.	<p>“Over 80% of Twitter’s revenue comes from advertising. In the third quarter of advertising services and \$127 million of which was from data licensing.” <i>Id.</i> at ¶ 25.</p> <p>“Twitter explains how it receives revenue from data licensing as follows: We generate data licensing and other revenue by (i) offering data products and data licenses that allow our data partners to access, search and</p>

1 2 3 4 5 6 7 8 9 10 11 12 13 Defendant's Claims	1 2 3 4 5 6 7 8 9 10 11 12 13 Plaintiffs' Allegations
	<p>analyze historical and real-time data on our platform (which consists of public Tweets and their content), and (ii) providing mobile advertising exchange services through our MoPub exchange. Our data partners generally purchase licenses to access all or a portion of our data for a fixed period. We recognize data licensing revenue as our data partners consume and benefit from their use of the licensed data..." <i>Id.</i> at ¶ 33.</p> <p>"Just two days after John Doe #1 first contacted Twitter, the videos had accrued over 167,000 views and 2,223 retweets. . . The videos remained live approximately another seven days, resulting in substantially more views and retweets." <i>Id.</i> at ¶ 37.</p> <p>"As long as content on Twitter's platform remains live, Twitter monetizes that content regardless of whether it is contrary to Twitter's own policies or promotes illegal conduct." <i>Id.</i> at ¶ 53.</p>

As the above chart indicates, Defendant's arguments, in multiple instances, are simple contradictions. Defendant has repeatedly made claims that are misleading, disingenuous, and untrue about what Plaintiffs' allegations contain. Given that under the motion to dismiss standard, Plaintiffs claims must be taken as true and all reasonable inferences drawn in their favor, Plaintiffs have sufficiently pled that Twitter knowingly received a financial benefit and something of value from the exploitation of Plaintiffs as victims of sex trafficking, as required for both Section 1591(a)(2) and Section 1595(a).

2. The FAC Sufficiently Alleges that Twitter Participated in What it Knew or Should Have Known was a Sex Trafficking Venture.

Section 1591(a)(2) and Section 1595(a) have distinct requirements for stating a sex trafficking beneficiary claim; Plaintiffs address each in turn.

a. The FAC Sufficiently Alleges that by Knowingly Possessing, Disseminating, and Refusing to Remove CSAM of Plaintiffs, Twitter Participated in What it Knew was a Sex Trafficking Venture.

Under § 1591(e)(4), "[p]articipation in a venture" "means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)." Plaintiffs have alleged § 1591(a)(1)

1 violations, as described above. As Plaintiffs have also alleged, this particular sex trafficking
 2 venture involved the mass distribution of CSAM depicting Plaintiffs, which Twitter assisted,
 3 supported, and facilitated by possessing and disseminating the CSAM through its platform –
 4 which is designed for quick, mass transmission – for nine (9) days.²⁰

5 Twitter dismissively merges § 1591 and § 1595 to some extent, but in general offers
 6 three main arguments as to Plaintiffs' allegations that Twitter participated in a venture they
 7 knew was sex trafficking: (1) Twitter did not have a common purpose with the initial sex
 8 traffickers, (2) Twitter was at most a passive beneficiary of sex trafficking profits, and (3)
 9 Twitter does not know what sex trafficking is. Plaintiffs respond to each argument in turn.

10 First, in multiple instances, Twitter argues that the FAC must allege that Twitter worked
 11 toward a “common purpose” with the initial sex traffickers in order to participate in a sex
 12 trafficking venture. MTD at 12-13.²¹ Twitter cites Racketeer Influenced and Corrupt
 13 Organizations Act (“RICO”) cases to support this proposition.²² But this is irrelevant—the
 14 RICO statute has a common purpose element, *Boyle v. United States*, 556 U.S. 938, 944 (2009),
 15 but § 1591 does not.

16 Second, Twitter cites *Afyare*’s analogy that a defendant who joins a soccer team whose
 17 members include sex traffickers who sponsor the team financially, does not violate § 1591(a)(2)
 18 unless that defendant commits “some overt act” that “furthers the sex trafficking aspect of the
 19 venture.”²³ Rather, Twitter argues, liability arises only when a defendant makes ‘some *overt*

21
 22²⁰ See FAC at ¶¶ 112-129.

23²¹ Defendants cite *United States v. Afyare*, 632 F. App’x 272, 283-86 (6th Cir. 2016) and
 24 *B.M. v. Wyndham Hotels & Resorts, Inc.*, 2020 WL 4368214, at *3 (N.D. Cal. July 30, 2020)
 25 to support this claim as well. But *Afyare* did not incorporate a common purpose requirement.
 The phrase “common purpose” cannot be found in that opinion, nor in *B.M.* And *B.M.* did
 not follow *Afyare* as to the elements of a §1595 violation. *B.M.*, 2020 WL 4368214, at *3.

26²² MTD at 13 n.11 (citing *United States v. Turkette*, 452 U.S. 576 (1981)(defining participation
 27 in a venture under RICO); *Washington v. Deleon*, 2019 WL 11691424 (N.D. Cal. July 9,
 2019) (defining “association in fact” in the RICO context).

28²³ MTD at 14 (citing *Afyare*, 632 F. App’x at 286) (internal quotation marks omitted). “Thus,
 the law does not punish a defendant for participation in a lawful venture with sex traffickers, or
 knowingly but passively receiving the financial benefits of sex trafficking.

act that furthers the sex trafficking aspect of the venture.” MTD at 14 (emphasis in original).

Aside from *Afyare* not being a controlling decision in this jurisdiction, its logic is inapposite. Playing soccer (i.e., the *Afyare*'s decision's analogy) is a lawful venture, however, CSAM possession and distribution are not. *See* 18 U.S.C. § 2252A. The decision's logic doesn't apply where the beneficiary defendant is engaging in illegal acts. By knowingly hosting, possessing, and distributing the CSAM of Plaintiffs, as Plaintiffs have alleged,²⁴ Twitter *has* engaged in overt acts that furthered the sex trafficking venture; to-wit: affirmatively denying all requests to remove the video and allowing many of thousands of people to access Plaintiffs' abuse.²⁵

Third, Twitter claims that it “did not know of the alleged sex trafficking,” MTD at 17, that “there is no allegation that any of these submissions informed Twitter that Plaintiffs were victims of sex trafficking,” MTD at 18, that “none of the reports or emails sent to Twitter about the videos indicated that Plaintiffs had been sex trafficked or that they involved commercial sex acts,” MTD at 21, and that Plaintiffs did not allege “that the videos would have, on their face, indicated to Twitter (or a reasonable viewer) that Plaintiffs had been trafficked and the videos involved commercial sex,” MTD at 18 (internal citation omitted).²⁶

This is misleading and meritless. Plaintiffs allege that they reported to Twitter that the

²⁴ FAC at ¶ 101-131.

²⁵ Bizarrely, Defendant claims that Plaintiffs do not “allege that the Perpetrators used Twitter in any way to further their illicit behavior,” MTD at 14, nor any “facts suggesting that Twitter actively participated in Plaintiffs’ alleged exploitation or took any overt act to further it,” MTD at 15. But the allegations described above, taken as true, describe Twitter possessing and distributing child pornography, which are federal crimes specifically under the child sexual exploitation section of the code, 18 U.S.C. § 2252, and – being felonies – also “illicit behavior.”

²⁶ Twitter repeatedly refers its refusal to remove child sexual abuse material as a nine-day “delay,” MTD at 3; 12; 21, as though they made a good-faith effort to remove the content but could not do so instantly. But Plaintiffs allege that Twitter demanded that John Doe 1 prove his age, and then when he did so, told him that the content did not violate Twitter’s policy. FAC at ¶¶ 113-14, 119. That is a refusal, not a “delay.” And Plaintiffs further allege an intervening circumstance through a family connection to a Homeland security agent, who contacted Twitter, at which point Twitter removed the CSAM. FAC at ¶¶ 128-129.

1 video contained 13-year-olds engaging in sexual acts, due to extortion and blackmail (that is,
 2 “in exchange for something of value” and thus commercial sex acts), that numerous users
 3 commented on their belief that the video featured minors, that one disseminating account had
 4 already been reported to Twitter for CSAM, and that Twitter monetized the distribution of this
 5 CSAM video featuring Plaintiffs. Plaintiffs additionally alleged that John Doe No. 1 reached
 6 out to Twitter and provided proof of age and identity, and specifically told Twitter that he and
 7 the other minor were “baited, harassed, and threatened to take these videos.”²⁷ Twitter had
 8 ample information and knowledge about the nature of this video.

9 Under federal law, sex trafficking a minor is a sex act, involving someone under 18, on
 10 account of which something of value is given to or received by any person. 18 U.S.C. § 1591(a);
 11 § 1591(e)(3).²⁸ And unless the charge is advertising, § 1591(a), nowhere does the TVPRA
 12 require that the defendant actually knew that someone was a sex trafficking victim to be liable.
 13 Reckless disregard or constructive knowledge suffice for civil liability. §§ 1591(a), 1595(a).

14 Plaintiffs also allege that the CSAM posts received considerable engagement, which
 15 taken together with the allegation that CSAM is commonly traded on Twitter, supports the
 16 inference that those accounts also received something of value for sharing the videos.²⁹ Due to
 17 one Plaintiff’s report and proof of age, Plaintiffs have alleged Twitter did know that commercial
 18 sex acts featuring them, as minors, were being disseminated through its platform. These
 19 allegations are, at the very least, sufficient to justify an inference that Twitter was in reckless
 20 disregard of Plaintiffs’ sex trafficking. Therefore, Plaintiffs have sufficiently alleged that

22
 23²⁷ FAC at ¶¶ 52-53, 57, 101-102, 112, 114, 121-123, 196.
 24²⁸ Twitter claims that pleading 1591 violations requires allegations that the “victim ‘will **in**
 25 **the future** [be] caused . . . to engage in prostitution.” MTD at 12 n.10 (emphasis in
 26 original)(citing *United States v. Todd*, 627 F.3d 329 (9th Cir. 2010)). First, the TVPRA
 27 applies to any commercial sex act, not just prostitution. Second, *Todd* clarified that someone
 28 who knew that force, fraud, or coercion would likely induce a commercial sex act could be
 liable; it was not necessary to know the future for the provision to apply. 627 F.3d at 333-34.
Todd did not state that no one can be held liable for a primary or beneficiary violation where
 the force, fraud, or coercion has already occurred. In any case, *Todd* does not apply here,
 because the Plaintiffs allege sex trafficking of minors.

²⁹ FAC at ¶ 71-77, 124.

Twitter knowingly supported, assisted, and facilitated – and thereby participated in – a sex trafficking venture.

b. The FAC Sufficiently Alleges that Twitter Participated in What it *Knew or Should have Known* was a Sex Trafficking Venture.

For a Section 1595 claim, this district requires that Plaintiffs allege that Twitter (1) “knowingly benefit[ted] financially or by receiving anything of value”; (2) from participation in a venture; (3) that they “knew or should have known [had] engaged in” sex trafficking.” *B.M. v. Wyndham Hotels*, 2020 WL 4368214, at *4. Defendant cites to *Afyare* to define participation in a sex trafficking venture. *See* MTD at 14-15. But contrary to Defendant’s contention, *B.M.* is distinguished from *Afyare*, in that *Afyare* was a criminal prosecution under § 1591, not a civil lawsuit under § 1595; moreover, *Afyare* was not at the motion to dismiss stage. *See Afyare*, 632 F. App’x at 273-74.

The *B.M.* court determined, as most courts have,³⁰ that the plaintiff “is not required to allege an overt act in furtherance of or actual knowledge of a sex trafficking venture in order to sufficiently plead her section 1595 civil liability claim,” and that imposing the § 1591 standard for “participation in a venture” would gut the § 1595 “should have known” language. *B.M.*, 2020 WL 4368214, at *3 (internal citations and quotation marks omitted); *see also J.C. v. Choice Hotels Int’l, Inc.*, No. 20-CV-00155-WHO, 2020 WL 6318707, at *7 (N.D. Cal. Oct. 28, 2020). Plaintiffs are not required to plead a § 1595 claim under a § 1591 standard – this jurisdiction has repeatedly rejected this approach.

Defendant also claims that the *M.A.* court “found a venture because the plaintiff alleged

³⁰ See, e.g., *S.Y. v. Wyndham Hotels & Resorts, Inc. & Laxmi of Naples, LLC*, No. 2:20-CV-619-JES-MRM, 2021 WL 1814651, at *4-5 (M.D. Fla. May 6, 2021); *E.S. v. Best W. Int'l, Inc.*, No. 3:20-CV-00050-M, 2021 WL 37457, at *3-4 (N.D. Tex. Jan. 4, 2021); *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d at 968-71 (S.D. Ohio 2019); *S.J. v. Choice Hotels Int'l, Inc.*, 473 F.Supp.3d 147, 152-54 (E.D.N.Y. 2020); *Doe S.W. v. Lorain-Elyria Motel, Inc.*, Case No. 2:19-cv-1194, 2020 WL 1244192, *6-7 (S.D. Ohio Mar. 16, 2020). But see *Doe I v. Red Roof Inns, Inc.*, Case No. 1:19-cv-3840, 2020 WL 1872335, at *3 (N.D. Ga. Apr. 13, 2020) (requiring “some participation in the sex trafficking act” for Section 1595 liability) (internal citation omitted); *Noble v. Weinstein*, 335 F. Supp. 3d 504, 524 (S.D.N.Y. 2018).

1 she saw the beneficiary defendant and her trafficker exchanging high-fives . . . while speaking
 2 about getting this thing going again.” MTD at 13 (internal citations omitted). This is almost the
 3 precise opposite of what *M.A.* concluded. The trafficker “high-fiving” a defendant was a fact
 4 pattern from *another* case, which the court cited to show what was *not* required to plead § 1595
 5 beneficiary claims; Plaintiffs need not allege “actual knowledge or conspiracy between
 6 [beneficiary defendants] and the trafficker.” *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F.
 7 Supp. 3d 959, 966 (S.D. Ohio 2019)(citing *Ricchio v. McLean*, 853 F.3d 553, 555 (1st Cir.
 8 2017)).

9 Similarly, Plaintiffs allege facts showing that Defendant “participated in a venture” by
 10 stating that Twitter possessed, disseminated, and refused to remove sex trafficking content.³¹
 11 Plaintiffs allege that they were repeatedly extorted into creating CSAM of themselves, which
 12 their exploiters then disseminated, which under § 1591(a), constituted commercial sex acts
 13 engaged in by persons under 18 years old.³² Plaintiffs also allege the following facts as to what
 14 Twitter should have known: (1) general knowledge of widespread CSAM on Twitter –
 15 evidenced through account shutdowns, (2) CSAM hashtags and search terms of CSAM –
 16 demonstrating Twitter’s ability to block hashtags, (3) difficult reporting structure and low
 17 reporting to NCMEC, (4) the existence of a specific report on one account for disseminating
 18 CSAM, which proved to be one of the same accounts circulating CSAM depicting Plaintiffs,
 19 (5) multiple reports from Plaintiff, himself, and his mother detailing the account, including
 20 Plaintiff proving his age, and (6) other Twitter users commenting that Plaintiffs appeared to be
 21 children.³³

22 These are not mere indirect indicators, but direct evidence of liability. The court in this
 23

24
 25 ³¹ Defendants may have misunderstood the purpose of Plaintiffs’ allegations about Twitter’s
 26 selective content policing. *See* MTD at 9 n.8. Plaintiffs did not allege the facts about
 27 Twitter’s content moderation practices to claim that Twitter was a content provider, but to
 28 claim that Twitter had the capacity to monitor and remove CSAM, and chose not to use it.
See, e.g., FAC at ¶ 50, 112-129.

³² FAC at ¶ 152.

³³ *Id.* at ¶¶ 70-84, 52-67, 101-102, 112-129.

1 this district has held that hotels have constructive knowledge of sex trafficking within their
 2 properties based on indicators like large numbers of men arriving for short stays, cash payments
 3 for reservations, and condoms in the rooms, *B.M.*, 2020 WL 4368214, at *6, even though the
 4 main crime tends to occur behind the closed doors of the hotel rooms. Nevertheless, in the
 5 instant case, Plaintiffs have sufficiently alleged that Twitter had constructive *and* actual
 6 knowledge of Plaintiffs' sex trafficking, which it could see for itself; the main crime happened
 7 in plain sight.³⁴ Indeed, if Twitter were a hotel, Plaintiffs' notice to Twitter would have been
 8 akin to the victim walking up to the front desk, handing the clerk his ID, and stating that he was
 9 being sexually abused in one of the hotel rooms, but instead of calling the police, the hotel
 10 employee sent him back to be further exploited. Accordingly, Plaintiffs have sufficiently
 11 alleged that Twitter participated in what it knew or should have known was a sex trafficking
 12 venture.

13 **C. The Legislative History Demonstrates Congress's Intent to Protect
 14 Victims of Sex Trafficking Such as the John Doe Plaintiffs in this Case.**

15 Section 230 has an exemption which eliminates immunity for civil claims "brought
 16 under section 1595 of title 18, if the conduct underlying the claim constitutes a violation of
 17 section 1591[.]" 47 U.S. Code § 230 (e)(5)(A).³⁵ Defendant discusses the history of the bill
 18 which enacted that exemption (i.e., FOSTA), indicating that FOSTA's reach was largely
 19 confined to its most infamous target. *See* MTD at 2, 4-5, 17.

20
 21 ³⁴ Defendant claims Plaintiffs did not allege facts suggesting that Twitter had a "continuous
 22 relationship" or "tacit agreement" with Plaintiffs' original traffickers, MTD at 19, but
 23 Plaintiffs did allege that Twitter had a continuous relationship with the CSAM posters for at
 24 least the relevant time period for this lawsuit, which was nine days, FAC at ¶¶ 112-129, as
 25 they were enabling each other to receive something of value, and with one account for
 considerably longer, as it had been reported for CSAM roughly a month before Plaintiff John
 Doe 1 requested a takedown, FAC at ¶¶ 101-102.

26 ³⁵ Twitter asserts that the exception only applies to civil cases against defendants who violate
 27 § 1591, but the exemption text states that the "conduct underlying the claim" not the
 28 "defendant's conduct" must violate 1591, 47 U.S.C. § 230 (e)(5)(A), which is almost
 certainly to limit the exception to sex trafficking claims, as labor trafficking claims are also
 covered by § 1595. That said, Plaintiffs do allege that Twitter has violated §1591, FAC at ¶¶
 133-55, and so falls within the FOSTA exemption.

1 Specifically, Twitter avers that FOSTA was “carefully targeted to remove civil
 2 immunity for the few criminal websites that, unlike Twitter here, were deliberately and
 3 knowingly assisting and profiting from reprehensible crimes[.]” MTD at 2. However, Plaintiffs
 4 *do* allege that Twitter was “deliberately and knowingly assisting and profiting from
 5 reprehensible crimes,” and that Twitter’s failure to remove the content at issue was not
 6 inadvertent, but deliberate.³⁶

7 Twitter also states that Congress “intended to revoke immunity only in extreme cases
 8 (like Backpage)[.]” MTD at 5 (citing 164 Cong. Rec. S1860-62) (statement of Senator Durbin).
 9 But a single Senator’s remarks do not define the exemption’s scope, and the Congressional
 10 record overall does not indicate an intent for the exception to be limited to actors as deliberate
 11 and organized as Backpage. The Congressional record even references the need to hold
 12 websites accountable for inaction or being complicit.

13 For example, the bill itself, which Twitter cites to in its MTD, states that “websites that
 14 promote and facilitate prostitution have been reckless in allowing the sale of sex trafficking
 15 victims and *have done nothing to prevent the trafficking of children* and victims of force, fraud,
 16 and coercion,” and that “clarification of such section is warranted to ensure that such section
 17 does not provide such protection to such websites.”³⁷

18 Individual congressional members also expressed this concern, including one that
 19 worried an amendment (removed before passage) would give websites *carte blanche* to
 20 passively profit from sex trafficking. *See* 164 Cong. Rec. S1849-08, S1853 (statement of Sen.
 21 Heitkamp)) (“I never believed that the Communications Decency Act protected them from
 22 prosecution or protected them from civil penalty *if they were complicit* and, in fact, abetted

23
 24
 25
 26
 27 ³⁶ See FAC at ¶¶ 112-129
 28 ³⁷ Allow States and Victims to Fight Online Sex Trafficking Act of 2017, PL 115-164, 132 Stat
 1253 (2018) (emphasis added).

1 these crimes.”) (emphasis added).³⁸ ³⁹

2 Even assuming, *arguendo*, that Defendant is correct about FOSTA’s narrow scope,
 3 whether and how Twitter’s actions compare to Backpage is a factual question that cannot be
 4 resolved at this stage of the litigation.⁴⁰ Pursuant to § 230, Plaintiffs have properly alleged that
 5 Defendant routinely receives, distributes, and profits from CSAM, and that Defendant
 6 knowingly did so with CSAM of Plaintiffs.⁴¹ The scope of the child sex trafficking and
 7 profiteering that Twitter engaged in, and whether it was deliberate or negligent, will be
 8 appropriately determined during the course of discovery and at trial.

9 Defendant claims that “in enacting FOSTA, Congress acknowledged that the *mens rea*
 10 requirement of Section 1591 is ‘difficult to prove’ when it comes to online service providers.”
 11 MTD at 17 (citing H.R. Rep. No. 115-572, pt. 1, at 3-6). Two distinctions, however, are in order.
 12

13 First, the House Report passage above is describing how hard it is to prove actual
 14 knowledge under § 1591(a)(1) claims for advertising, H.R. Rep. No. 115-572, at 5, which are
 15 the only § 1591(a)(1) claims that require actual knowledge to establish *mens rea* – the remaining
 16 claims rely on a mere showing of reckless disregard, 18 U.S.C. § 1591(a)(1). However, in the
 17 instant case, Plaintiffs have not alleged any § 1591(a)(1) claims for advertising in the FAC, so
 18

19 ³⁸ *And see* 164 Cong. Rec. S1849-08, S1855 (statement of Sen. Portman) (“For instance, if
 20 backpage or another website filters for illegal content and, as a result, learns that their site is
 21 being used for trafficking but ignores that activity, I think this amendment would say that
 22 evidence could not be considered in a case against backpage. To me, that is wrong[.]”)

23 ³⁹ 115 Cong. Rec. H1290, 1291 (statement of Jackson Lee) (Believing FOSTA would hold
 24 accountable “those websites that have acted recklessly in allowing the sale of victims of sex
 25 trafficking online, *or stood idly by* while young boys and girls—many as young as thirteen
 26 years old or even younger—were coerced, threatened, tortured, bought, and sold on the
 27 whims of their exploiters.”) (emphasis added).

28 ⁴⁰ Interestingly, one of the examples of Backpage’s depravity cited in the congressional
 29 record bears some similarity to the allegations in this case. Sen. Portman described
 30 Backpage’s response to a mother who reported an ad for her missing child: “I found my
 31 daughter on your website. She is 14 years old. Thank you for taking down that ad and helping
 32 me to connect with my daughter. The answer from backpage.com was this: You didn’t pay
 33 for the ad. We will not take it down. Again, talk about evil.” 164 Cong. Rec. S1849-08,
 34 S18555.

⁴¹ FAC at ¶¶ 61-84,112-129.

1 Defendant's argument on this point is irrelevant and misleading.

2 Secondly, the House Report passage above refers to criminal prosecutions, where the
 3 evidentiary standard is "beyond a reasonable doubt." Yet, this is a civil case, where the standard
 4 is a preponderance of evidence. Moreover, in relation to a motion to dismiss, the standard of
 5 proof is irrelevant, because Plaintiffs do not have to prove anything at this stage of litigation;
 6 they simply must allege enough to state a legal claim.

7 **III. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT DOES NOT
 8 BAR CLAIMS FOR TWITTER'S KNOWING, UNLAWFUL CONDUCT.**

9 Twitter argues that it is completely immune from liability for its knowing, continued
 10 distribution of CSAM under CDA 230. MTD at 8. However, this position directly contradicts
 11 the statute's plain language, its context, and the legislative intent. The statute was never
 12 intended to immunize conduct that entails both criminal and civil liability. *See, e.g., Fair Hous.*
 13 *Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008)
 14 (conduct that is "unlawful when posed face-to-face or by telephone, [does not] magically
 15 become lawful when asked electronically online. The Communications Decency Act was not
 16 meant to create a lawless no-man's-land on the Internet.")

17 **A. The Plain Text of CDA 230 Does Not Immunize Twitter's
 18 Knowing Violations of Child Pornography Laws.**

19 All questions of statutory construction "begin with the plain language of the
 20 statute."⁴² "The plain meaning governs unless a clearly expressed legislative intent is to the
 21 contrary, or unless such plain meaning would lead to absurd results." *Dyer v. United States*, 832
 22 F.2d 1062, 1066 (9th Cir. 1987). When determining if the plain language is sufficient, courts
 23 are to consider: (1) the language itself; (2) the specific context in which that language is used;
 24 and (3) the broader context of the statute as a whole. *Rowe v. Educ. Credit Mgmt. Corp.*, 559
 25 F.3d 1028, 1032 (9th Cir.2009).

26
 27 ⁴² *Cheneau v. Garland*, No. 15-70636, 2021 WL 1916947, at *4 (9th Cir. May 13, 2021) citing
 28 *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (internal citations omitted); *Rowe v. Educ.*
Credit Mgmt. Corp., 559 F.3d 1028 (9th Cir.2009).

1 A review of the plain language of the statute makes it clear that CDA 230 immunity is
 2 only triggered by good faith removal of content. Specifically, the statute reads:

3 (c) Protection for “Good Samaritan” blocking and screening of
 4 offensive material

5 (2) Civil liability. No provider or user of an interactive computer
 6 service shall be held liable on account of—

7 (A) any action voluntarily taken in good faith to restrict access to or
 8 availability of material that the provider or user considers to be
 9 obscene, lewd, lascivious, filthy, excessively violent, harassing, or
 10 otherwise objectionable, whether or not such material is
 11 constitutionally protected; or

12 (B) any action taken to enable or make available to information
 13 content providers or others the technical means to restrict access to
 14 material described in paragraph (1).

15 47 U.S.C. 230(c)(2) (emphasis added)

16 The liability shield provided by this subparagraph requires a triggering event. In other
 17 words, in order to trigger immunity, an interactive computer service must **take action** in good
 18 faith to restrict access to material, which is the opposite of what Twitter did in the instant case.
 19 At no point does the statute’s plain language immunize a failure to act, or, as in this case, a refusal
 20 to act. Remarkably, Twitter urges that this plain meaning be flipped. Twitter is not being sued
 21 for any action “restricting access...or availability” to the CSAM. It is being held accountable for
 22 its knowing and continued distribution and monetization of the CSAM, which is beyond the
 23 scope of CDA 230’s immunity.⁴³

24 Some Ninth Circuit decisions have interpreted the liability shield in CDA 230 to cover
 25 not just the removal of objectionable content, but the decision whether to remove the content.
 26 See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009), as amended (Sept. 28,

27 ⁴³ See *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir.
 28 2019) (“Good Samaritan” provision of the CDA immunizes computer-software providers from
 29 liability for *actions affirmatively taken* to restrict or block obscene, lewd, lascivious, filthy,
 30 excessively violent, harassing, or otherwise objectionable content); *Zango, Inc. v. Kaspersky*
 31 *Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009) (“Good Samaritan” provision of the CDA immunizes
 32 acts taken in furtherance of blocking materials that the provider determine to be obscene, lewd,
 33 lascivious, filthy, excessively violent, harassing, or otherwise objectionable).

1 2009) citing *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d
 2 1157, 1170–71 (9th Cir. 2008). This interpretation is not consistent with the plain language of §
 3 230(c)(2), which only limits liability for “any action . . . to restrict access” to harmful content. In
 4 any event, these decisions do not apply to the instant case, because they do not hold that CDA
 5 230 immunizes a knowing decision to possess and distribute CSAM and Twitter has pointed to
 6 no controlling authority for such a proposition.

7 **B. The Stated Purpose of CDA 230 is Inconsistent and Incompatible
 8 with the Absolute-Immunity Interpretation Urged by Twitter.**

9 Twitter’s argument for immunity for all third-party content, even contraband –
 10 specifically, child pornography, also cuts against the purpose of CDA 230 as expressed
 11 succinctly in its title: “Protection for private blocking and screening of offensive material.”
 12 Similarly, the second paragraph of CDA 230 sets forth “the policy of the United States,”
 13 including: “to remove disincentives for the development and utilization of blocking and filtering
 14 technologies that empower parents to restrict their children’s access to objectionable or
 15 inappropriate online material,” and “to ensure vigorous enforcement of Federal criminal laws
 16 to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.”
 17 47 U.S.C.A. § 230(b)(4)-(5). These subparagraphs demonstrate that Congress’s priority amid
 18 the internet’s continued development was ensuring that there would also be ongoing
 19 development of the ability to restrict childrens’ access to harmful, or even objectionable
 20 material.⁴⁴ The Supreme Court stated “the purpose of the CDA is to protect children from the
 21 primary effects of ‘indecent’ and ‘patently offensive’ speech. . . .” *Reno v. ACLU*, 521 U.S. 844,
 22 868 (1997). In *Reno*, the Court struck down part of the protections for children as inconsistent
 23 with the First Amendment. Yet, the overall purpose of the CDA – protection of children online
 24 – remains clear.

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 27 ⁴⁵ See generally, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003)
 28 (“Congress enacted this provision as part of the Communications Decency Act of 1996 for two
 basic policy reasons: to promote the free exchange of information and ideas over the Internet
 and to encourage voluntary monitoring for offensive or obscene material.”)

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**C. CDA 230 Does Not Immunize Twitter from Civil Liability for
Possession and Distribution of Child Pornography because it is
Illegal Contraband, Not Speech.**5
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12 Twitter argues it is immune from Plaintiffs' claims that it knowingly possessed and
distributed child pornography in violation of 18 U.S.C. §§ 2252A and 2255. MTD at 21. This
is an unsupportable reading of CDA 230 for two reasons. First, CSAM material is not lawful
"information provided by another information content provider," but rather is illegal contraband,
stemming from the sexual abuse of a child, and wholly outside any protection or immunity
under the law, to include CDA 230. Second, CDA 230 was enacted to incentivize internet
service providers ("ISP's") to protect children, not immunize them for intentionally or
recklessly harming them.13
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21 CDA 230's prohibition of ISPs from being treated as "speaker[s]" of "information" is
not implicated here because child pornography is not protected speech and conveys no
information; rather, it is filmed child abuse and illegal contraband. Instead, Twitter attempts to
minimize its violations under 18 U.S.C. § 2252A. See, e.g., MTD at 21 (noting the "mere
passage of nine days between offending tweet and content takedown"). This blithely ignores
the devastating harms of CSAM distribution. As the Supreme Court has explained, "demand
for child pornography harms children in part because it drives production" and "the harm to the
child is exacerbated by its circulation." *Paroline v. U.S.*, 572 U.S. 434, 439-40 (2014). Congress
has been very clear on this point:22
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26 The harms caused by child pornography begin, but do not end, with child
sex assault because child pornography is a permanent record of that
abuse and trafficking those images compounds the harm to the child . . .
Victims suffer continuing and grievous harm as a result of knowing that
a large, indeterminate number of individuals have viewed and will in the
future view images of their childhood sexual abuse. Harms of this sort27
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⁴⁵ See generally, *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003)
("Congress enacted this provision as part of the Communications Decency Act of 1996 for two
basic policy reasons: to promote the free exchange of information and ideas over the Internet
and to encourage voluntary monitoring for offensive or obscene material.")

are a major reason that child pornography is outlawed.⁴⁶

Indeed, the scale of Twitter's alleged possession and redistribution of CSAM victimizing Plaintiffs is staggering. Twitter's own tracking system shows that as of the second day of the video being posted by one user, the CSAM was viewed at least 167,000 times and retweeted over 2,200 times. Moreover, these numbers continued to increase exponentially for the remaining seven days.⁴⁷

Twitter cites an unreported decision from the Eastern District of Texas for the proposition that technology companies are immune from civil claims for violations of 18 U.S.C. §§ 2252A and 2255. MTD at 21 (citing *Doe v. Bates*, 2006 WL 3813758 (E.D. Tex., Dec. 27, 2006)). *Bates* is a non-binding, first of its kind, federal decision extending CDA immunity to a civil suit alleging receipt and possession of child pornography. *Bates* relies on the Fourth Circuit’s decision in *Zeran*⁴⁸ and a district court decision, *Noah v. AOL Time Warner*.⁴⁹ Neither dealt with child pornography. The *Zeran* decision is a detailed examination of a defamation claim and was one of the first decisions after the inception of CDA 230, meaning the *Zeran* court did not have the benefit of other caselaw to build upon when rendering its decision. The Court’s analysis of the terms “publisher” and “speaker” from CDA 230, as well as the defamed Plaintiff’s arguments that the Defendant was a “distributer” all take place in the context of defamation law. *See, Zeran*, 129 F.3d at 331-34. A distributer of child pornography, however, is not analogous to a distributer of defamatory statements. Child pornography is at once contraband, beyond the covering of First Amendment speech protection, evidence of criminal child abuse, and an ongoing sexual crime against a child. The *Bates* decision is wrong when it says it is following *Zeran*’s approach for a “publisher’s traditional editorial functions.” *Bates*, 2006 WL 3813758 at *20. No one exercises “traditional editorial functions” over CSAM.

⁴⁶ Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, PL No. 115-299 (2018).

47 FAC ¶ 124-5.

⁴⁸ *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

⁴⁹ *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 537 (E.D. Va. 2003), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004).

1 Everyone has the same responsibility: the strictest obligation to not create, possess, or distribute
 2 it – enforced by both criminal and civil liability. The *Noah* decision is inapposite as it focused
 3 on a public accommodation claim under Title II of the Civil Rights Act premised on AOL’s
 4 moderation of a chat room on its platform. Neither *Zeran* nor *Noah* provide any grounds to
 5 immunize child pornography possession and distribution; nor are they binding on this court.
 6

7 Lastly, Congress made clear that child protection was a paramount purpose of CDA 230.
 8 It references protecting children from harmful material, 47 U.S.C. § 230(b)(4). It mandates an
 9 obligation by ISPs to notify its customers of parental controls and filter technology available to
 10 protect children, § 230(d). Finally, it specifically targeted two areas of criminal law as unaffected
 11 by CDA 230 – one of which is “chapter . . . 110 of title 18 (relating to sexual exploitation of
 12 children),” which includes §§ 2252A and 2255. See, § 230(e)(1). It is untenable then, to assert
 13 that CDA 230 immunizes platforms from knowingly possessing and distributing child sexual
 14 exploitation material.

15 Congress intended to create civil liability for possession and distribution of child
 16 pornography even against platforms like Twitter. The civil remedy for § 2252A was added to §
 17 2255, and the § 2258A reporting requirement for electronic service providers was made law, in
 18 a bill titled Protection of Children from Sex Predators Act of 1998, PL 105–314, 112 Stat 2974
 19 (1998). This bill was passed two years *after* the Communications Decency Act of 1996,
 20 demonstrating congressional understanding that CDA 230 immunity was not implicated with
 21 respect to possession and distribution of child pornography. Additionally, § 2252A specifically
 22 and repeatedly recognizes that the elements of the offense can be met through actions “by any
 23 means, including by computer.” And § 2252A liability for knowing distribution applies to “any
 24 child pornography” – regardless of the publication status of the material, and regardless of
 25 whether it was originally created by a third party. 18 U.S.C. § 2252(A)(a)(2). The very laws
 26 Congress enacted show that limiting liability for child pornography was not what it intended
 27 when it enacted CDA 230. As Justice Thomas recently recognized, “[e]xtending § 230
 28 immunity beyond the natural reading of the text can have serious consequences. Before giving
 companies immunity from civil claims for knowingly hosting illegal child pornography. . . we

1 should be certain that is what the law demands.” *Malwarebytes, Inc. v. Enigma Software Grp.*
 2 *USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J. dissenting) (internal citations omitted).

3 Twitter does not claim that the FAC fails to establish the elements of 18 U.S.C. § 2252A.
 4 This is a necessary concession. The facts – which at this stage must be accepted as true –
 5 demonstrate that Twitter was notified of the presence of child pornography as defined by 18
 6 U.S.C. § 2256(8). FAC ¶¶ 112-119. As noted above, to apply CDA 230 immunity under these
 7 facts would defeat the statute’s purpose, not to mention make the immunity specifically for
 8 restricting harmful material superfluous. Section 230 offers immunity for publishing and
 9 distributing third parties’ information, not for possessing and distributing contraband. *See* 47
 10 U.S.C. § 230(c)(1).

11 **D. Twitter Failed its Statutory Duty to Report the Child Sex Abuse**
 12 **Material Harming the Plaintiffs.**

13 “In order to reduce the proliferation of online child sexual exploitation and to prevent
 14 the online sexual exploitation of children,” Twitter is required to report “as soon as reasonably
 15 possible after obtaining actual knowledge of any facts or circumstances” indicating any
 16 “apparent” or “imminent” violation of 18 U.S.C. 2252A “that involves child pornography.” 18
 17 U.S.C. § 2258A(a)(1) and (a)(2). Twitter contends that this provision does not create a civil
 18 cause of action. MTD at 22. But Congress intended to make deliberate and reckless violations
 19 of 2258A privately enforceable. *See* 18 U.S.C. § 2258B(b) (permitting civil claims against
 20 providers, based on intentionality or recklessness, including failure to act). The FAC alleges
 21 that Twitter both engaged in intentional misconduct and failed to act within the meaning of
 22 2258B(b)(1) and (2).

23 Additionally, the standards of misconduct in paragraph (b) of 2258(B) establish the duty
 24 of care that Twitter owes Plaintiffs. Twitter’s reporting requirements under § 2258A with regard
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1 to CSAM provide the standard of care for negligence actions.⁵⁰ Accordingly, the allegations
 2 that Twitter has violated 18 U.S.C. § 2258A serve the dual purpose of establishing liability
 3 under both federal and state law.

4 **IV. THE FAC SUFFICIENTLY ALLEGES A PRODUCT LIABILITY CLAIM
 5 BASED ON TWITTER'S UNREASONABLY UNSAFE DESIGN AND
 6 PERFORMANCE.**

7 Twitter argues that CDA 230 also immunizes it from Plaintiffs' product liability claim.
 8 This is wrong because Plaintiffs' negligent design claim does not attempt to treat Twitter as the
 9 "publisher or speaker" of information. Rather it seeks to hold Twitter accountable for failing in
 10 its "duty to exercise due care in supplying products that do not present an unreasonable risk of
 11 injury or harm to the public." *Lemmon v. Snap, Inc.*, No. 20-55295, 2021 WL 1743576, at *4
 12 (9th Cir. May 4, 2021). In its recent decision in *Lemmon v. Snap, Inc.*, the Ninth Circuit
 13 explained the distinction.

14 The duty underlying [product liability claims] differs markedly from the
 15 duties of publishers as defined in the CDA. Manufacturers have a
 16 specific duty to refrain from designing a product that poses an
 17 unreasonable risk of injury or harm to consumers. Meanwhile, entities
 18 acting solely as publishers—*i.e.*, those that review material submitted for
 19 publication, perhaps edit it for style or technical fluency, and then decide
 20 whether to publish it—generally have no similar duty.

21 *Lemmon*, 2021 WL 1743576 at *5.

22 Here, Plaintiffs seek to hold Twitter accountable for designing its product with an
 23 unreasonable risk of harm to users. FAC ¶¶ 187-190. Notably in the *Lemmon* decision, the Ninth
 24 Circuit rejected a social media platform's attempt to argue that CDA 230 applied because the
 25 platform allowed "its users to transmit user-generated content to one another. . . ." *Id.* at *5.
 26 Similar to Snap Chat, another popular social media platform, Twitter's "duty to design a

27 ⁵⁰ *DiRosa v. Showa Denko K.K.*, 44 Cal. App. 4th 799, 808 (1996) ("There is no doubt in this
 28 state that a federal statute or regulation may be adopted as a standard of care."); *Beaver v.
 Tarsadia Hotels*, 29 F. Supp. 3d 1294, 1321 (S.D. Cal. 2014), *aff'd*, 816 F.3d 1170 (9th Cir.
 2016) ("A federal statute or regulation may be adopted as a standard of care in a negligence
 action.").

1 reasonably safe product is fully independent of [its] role in monitoring or publishing third-party
 2 content. *Id.*

3 Finally, Twitter argues for dismissal of the products liability claim saying that Plaintiffs'
 4 allegations do not clearly identify which aspect of the Twitter platform is the product. Twitter
 5 also suggests that its platform might be something other than a "product." MTD at 22-23. These
 6 semantics are unavailing. First, Twitter's multitudinous features do not change the fact that
 7 Twitter is a defectively designed product that has harmed John Doe #1 and John Doe #2.
 8 Whether it is Twitter's architecture for its online interface, mobile interface, API, search-
 9 function capability, ineffective reporting processes, or hashtags – or all of these things –
 10 Plaintiffs' allegations demonstrate an unreasonable risk of harm within Twitter's actual
 11 platform design. If, for example, Twitter's search function did not assist child predators in
 12 finding CSAM, then the CSAM depicting John Doe #1 and John Doe #2 would not have had
 13 as prolific a distribution. By design, Twitter enabled the broad distribution of illegal harmful
 14 material.

15 Second, Twitter incorrectly suggests that its platform is not subject to product defect
 16 liability because it is not "geared to the tangible world." The federal courts apply product-
 17 liability principles to internet-based platforms. *See, Lemmon*, 2021 WL 1743576. What matters
 18 is whether Twitter has fallen short of its duty to protect the public from unreasonable risky
 19 and/or dangerous products entering into commerce. Simply put, there is no wholesale
 20 exemption for technology-based products from design-defect liability. CDA 230 does not grant
 21 Twitter immunity from harm caused by dangerously designed products. As alleged at this
 22 pleading stage, Plaintiffs' product liability allegations are sufficient to proceed.

23 **V. PLAINTIFFS' STATE LAW CLAIMS SHOULD BE ALLOWED TO
 24 PROCEED BECAUSE THEY SUFFICIENTLY ALLEGE A VIOLATION OF
 25 TWITTER'S STATUTORY OBLIGATIONS AND DUTY OF CARE ONCE IT
 KNEW ABOUT THE CSAM DEPICTING THE PLAINTIFFS.**

26 Twitter contends that Plaintiffs' Negligence Per Se and Negligent Infliction of
 27 Emotional Distress causes of action are infirm and untenable because they are not separate
 28 causes of actions, which appears to be a variant of arguing they involve the "same primary

right.” Such a contention is misplaced. These causes of action, on their very face, reveal that they are not duplicative. Although these causes of action include a number of similar allegations and claims, each is premised on a separate and distinct theory. For example, in the cause of action or Negligence Per Se, Plaintiffs allege a different theory of negligence based upon a number of specific violations of various statutes. Moreover, it is black-letter law that a plaintiff may plead multiple theories of recovery based on the same set of facts. (4 Witkin Cal. Proc. (5th ed. 2008) § 402ff; *see e.g. Perry v. Robertson*, 201 Cal.App.3d 333, 339-340 (1988)). This notion is buttressed by the fact that separate California Civil Jury Instructions (“CACI”) exist for each of these causes of action. (See e.g. CACI No. 418 at 262 (Negligence Per Se); CACI 1620 at 961 et seq. (Negligent Infliction of Emotional Distress).⁵¹

It is true that negligence per se functions as a presumption to establish a defendant’s duty of care. Cal. Evid. Code § 669. But that simply means that Plaintiffs’ allegations of Twitter’s multiple violations of its statutory duties should be read in tandem with its negligence claims. *Tinoco v. San Diego Gas & Elec. Co.*, No. 17-CV-2433-BAS-JLB, 2018 WL 4562479, at *2 (S.D. Cal. Sept. 21, 2018) (denying motion to dismiss negligence per se claim where it was clear that plaintiffs relied in part on violations of statutory duty to establish negligence). Here, Plaintiffs allege the elements to meet the presumption of negligence per se and have presented multiple other negligence claims. Under these circumstances, the Court should treat the negligence per se claim as a support to, and part of, the other negligence claims. See *Dillard v. Victoria M. Morton Enterprises, Inc.*, No. 08-1339 FCD/GGH, 2008 WL 11388472, at *5 (E.D. Cal. Oct. 8, 2008) (dismissing negligence per se as an independent claim, but treating the substantive allegations supporting the negligence per se claim as into other negligence claims). Moreover, Twitter’s request for outright dismissal of the negligence per se claim is premature and should be rejected because in California negligence per se

⁵¹ Judicial California Jury Instructions, https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf (last viewed June 7, 2021).

1 functions as an evidentiary presumption and “evidentiary presumptions are inappropriate for
 2 evaluation at the pleadings stage.” *Balderas v. Countrywide Bank, N.A.*, 664 F.3d 787, 790
 3 (9th Cir. 2011) (internal citations omitted).

4 **VI. PLAINTIFFS’ BUSINESS AND PROFESSIONAL CODE SECTION 17200
 5 SUFFICIENTLY ALLEGES A CLAIM.**

6 Twitter's argument regarding Plaintiffs' Business and Professions Code Section 17200
 7 rests upon a misreading of the statute. Specifically, Twitter appears to conflate the factual
 8 predicate to maintain a § 17200 violation. “Unfair competition” is defined in the UCL as any
 9 one of the following wrongs: (1) an “unlawful” business act or practice; (2) an “unfair” business
 10 act or practice; (3) a “fraudulent” business act or practice; (4) “unfair, deceptive, untrue or
 11 misleading advertising”; and (5) any act prohibited by §§ 17500 through 17577.5. Salient here
 12 is the fact that these definitions are disjunctive, and each of the wrongs operates independently
 13 from the others. As such, a practice is prohibited as ‘unfair’ or ‘fraudulent’ even if not
 14 ‘unlawful’ and vice versa. Here, Twitter's criminal, aiding and abetting conduct is actionable
 15 under § 17200. *Chetal v. Am. Home Mortg.*, No. C 09-02727 CRB, 2009 WL 2612312, at *4
 16 (N.D. Cal. Aug. 24, 2009) (noting that an aiding and abetting theory is available under the
 17 UCL); *Plascencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008)
 18 (allowing claims to proceed on aiding and abetting theory).

19 Moreover, in support of its request that the 17200 claim be dismissed in its entirety,
 20 Twitter resorts to arguing that Plaintiffs will ultimately not be able to avail themselves of the
 21 full spectrum of damages available under a 17200 claim. Such an argument puts the cart before
 22 the horse. Indeed, the availability of a certain remedy is not relevant to a determination of
 23 standing to assert the claim. *See Finelite, Inc. v. Ledalite Architectural Prods.*, No. C-10-1276
 24 MMC, 2010 WL 3385027, at *2 (N.D. Cal. Aug. 26, 2010) (the right to seek injunctive relief
 25 under the UCL is not dependent on the right to seek restitution; the two are wholly independent
 26 remedies). Indeed, a Section 17200 Plaintiff seeking only injunctive relief can have standing.
 27 *See In re Tobacco II Cases*, 46 Cal. 4th 298, 319 (2009). In addition, there is nothing about the
 28 injury sustained by the Plaintiffs here to support a finding that there was not an economic injury

1 associated therewith. Twitter can hardly argue that the monetization and dissemination of
2 Plaintiffs' images and likenesses do not constitute a cognizable property right capable of
3 protection under Section 17200. (*See e.g. Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 811
4 (N.D. Cal. 2011) (noting that plaintiffs sufficiently alleged a loss of money or property based
5 on potential unpaid compensation where Facebook used plaintiffs' Facebook profiles to endorse
6 third- party products and services)).

7 **CONCLUSION**

8 For all these reasons, Plaintiffs respectfully request that the Court deny Defendant's
9 Motion to Dismiss and allow Plaintiffs the opportunity to prove their claims.

11 Respectfully submitted this 7th day of June, 2021.

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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email address denoted on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 7th day of June, 2021.

/s/ Hannah E. Mohr

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